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REPORT TO THE PUBLIC DEFENDER COMMISSION

William F. Hooks, Chief Public Defender

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PROGRAM 1 UPDATE

Management Team. I am pleased to announce that Kaydee Snipes accepted my offer to become our new Regional Deputy Public Defender for Region 6, based in Havre. Kaydee is a graduate of Montana State University and Gonzaga University School of Law. She was in private practice and worked with OPD as a contract attorney, and then joined OPD as a staff attorney in Havre. Kaydee replaces Tom Schoenleben, who took a job in our Hamilton office.

The clients of Region 6 will continue to be well-served under Kaydee's leadership, together with administrative assistant Jamie Moore, investigator Cathy Huston and attorney Scott Shellenberger.

Workload Issues. In general, the number of new cases we opened in Fiscal Year (FY) 2014 remained roughly the same as we opened in FY 2013. In the past three years, our case filings increased by slightly more than 15%.

Our attorneys continue to labor under caseloads that exceed the recommended maximum case weights. The Commission has determined that caseload levels are the single biggest predictor of the quality of public defense representation, but it did not set specific caseloads.

In considering maximum caseload standards, it is inherently difficult to compare the work required for different types of cases. Each case is so individually different, that it is nearly impossible to set rigid numerical objectives. Also, physical and geographical factors can influence an office's caseload capacity as well. An office which from a single location in a geographically large jurisdictional area is required to serve numerous distant scattered courts has a lower caseload capacity per attorney than an office in a geographically small jurisdiction or one in which all of the courts, the jail, and the public defender's office are housed in a single building. *(PDC Standard V.2.A.)*

Program 1 uses a case weight system to monitor workloads. This system requires daily tracking of case assignments, generation of summary reports, and monitoring of each attorney's monthly case rates by supervising attorneys. A labor-management committee has adopted a recommended maximum caseload of 125 hours per month. A substantial majority of our attorneys consistently exceed this recommended maximum work load each month.

We are in the process of opening a new Region 6 branch office in Glasgow, staffed by Casey Moore, who currently works in our Billings office. Having a Glasgow-based staff attorney will help address a number of resource-related problems we face in the northeastern part of the state. Region 6 is more than 22,500 square

miles in size. The current staff attorneys are based in Havre, and the vast distances they have to travel to courts in the region impose obstacles in providing legal services to clients in the eastern end of the region. The attorneys and staff in Glendive (Region 10) are dealing with a significant spike in the numbers of new felony cases and new dependent/neglect cases filed in Dawson County and Richland County, as compared to last year. It is difficult for the attorneys to also cover cases in courts in the northern part of the region. The Glasgow-based attorney will be more accessible to clients in the area, and by taking on cases in and around Glasgow, will relieve the workload stress on staff attorneys and contract attorneys.

We hope to have the office staffed around September 1.

Treatment Courts. The increasing development of treatment courts is a source of workload stress on our staff attorneys. It also has a fiscal impact, as we utilize contract attorneys to provide representation in several of these courts. We are in the process of reviewing our role in the various treatment courts, and will report to the Commission at a future date. Issues that may need to be developed and discussed include (1) whether OPD involvement should be restricted to certain types of treatment court models, and (2) whether standards of representation should be developed for attorneys who appear in treatment courts.

The Nature of Treatment Courts. A treatment court is a type of specialty “court within a court.” This type of court implements a program of incentives and sanctions intended to assist a participant in addressing an identified problem (for example, mental health issues or drug addiction) and to cease criminal behaviors.¹

Treatment courts can be designed to address specific issues or problems. In Montana, we have adult drug courts, family courts, juvenile drug courts, mental health courts, veterans’ courts, DUI courts and co-occurring courts. Montana statutes provide for drug treatment courts and mental health courts. See, secs. 46-1-1101, 46-1-1201, MCA. The court typically relies on a “treatment team,” of which a defense attorney is a member. Some courts retain an attorney to serve as the defense attorney, and build this into their grant or budget. Other courts look to OPD staff attorneys or private attorneys to provide defense representation as part of this team.

There are different court models, which vary according to the stage at which a person enters the court. In a pre-plea model, a participant enters the program as part of a pre-trial diversion agreement with the understanding that the charges will be dismissed upon successful completion of treatment. In a post-plea/pre-adjudication program, a person pleads guilty and the adjudication is held in abeyance and is vacated or withdrawn upon successful completion of treatment. In a post-plea model, a person enters into a treatment court as a condition of sentence imposed following conviction. In sum, depending on the court model, a person may be processed in the treatment court as a condition of pretrial release, pretrial diversion, probation, incarceration, parole, or other release from a detention or correctional facility.

Growth of Treatment Courts. In 2010, Montana had 20 treatment courts. The Montana Supreme Court Administrator listed 25 treatment courts in its 2012 report. These courts include 9 adult drug courts, 3 family

¹ The Montana Supreme Court recently discussed the nature of treatment courts, in *State v. Plouffe*, 2014 MT 183 (Mont. July 15, 2014).

drug courts, 2 co-occurring courts, 2 veterans' courts, 3 juvenile courts, and 6 DUI courts.² A working group has been formed to consider creating a mental health court in Lewis and Clark County.

Prior Public Defender Commission Review. The Commission was provided with a report on treatment courts in Montana, on April 23, 2010. This report listed the type of court and the number of staff attorneys or contract attorneys who appeared in those courts.

The Commission addressed the issues relating to public defender representation in treatment courts during its October 24, 2011 meeting. The minutes reflect that commissioners felt OPD perhaps should not be involved in representing persons in post-plea DUI courts, as this service was outside the agency's mission. Additional concerns were voiced about OPD having to represent persons who did not have to undergo a review of financial eligibility. Issues related to treatment courts were again raised during the Commission's February 10, 2012 meeting. While there was discussion about taking steps to terminate staff attorney participation, the Commission decided to table the discussion.

We will undertake a review of the various treatment courts and identify the demands these courts place on our staff and resources.

Representational Issues. The goals of treatment court are achieved through a collaborative approach. Thus, these courts operate in a manner that is fundamentally different than the traditional adversarial system. The National Association of Drug Court Professionals, together with the U.S. Department of Justice's Office of Justice Programs, developed 10 guiding principles of operating an effective drug court. One of these *Key Components* addresses the duties of defense counsel:

Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

To facilitate an individual's progress in treatment, the prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team. Once a defendant is accepted into drug court, the team's focus is on the participant's recovery and law-abiding behavior, not on the merits of the underlying criminal offense.

OPD does not have standards of representation for attorneys who appear in treatment courts. As part of our review, we will review standards of practice for these courts.

Capital Case Update and Rate Review. We currently have one capital case in the clemency stage.³ Two capital cases were pending in Richland County. Recently, the State withdrew its notice of intent to seek imposition of

² The report, "MONTANA DRUG COURTS: AN UPDATED SNAPSHOT OF SUCCESS AND HOPE," may be accessed at http://courts.mt.gov/content/cao/ct_services/treatment/docs/2010_dc_report.pdf

³ The Montana Supreme Court *Standards for Competency of Counsel for Indigent Persons in Death Penalty Cases*, and the PDC Standards, refer to the American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. Section 1.1 of these Guidelines provides that the Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death

the death penalty in one of these cases. In the other case, the accused entered a guilty plea pursuant to a plea agreement. The State has not formally withdrawn its notice of intent in that case.

The Commission approved increased rates for attorneys and investigators in these cases, based on several unique factors and challenges posed by these cases. As we no longer consider these to be viable capital cases, we have reverted back to the usual rate for counsel and investigators in these cases.

Administrative Rule 2.69.601(2) authorizes the Commission to determine appropriate compensation rates for contract attorneys and others who provide services related to the provision of public defender services.

ACLU Information Request. The American Civil Liberties Union of Montana submitted a request to OPD for information and documentation. We responded by producing a number of documents and reports. We have had a meeting and telephone discussions with ACLU representatives as well.

Creation of Program 3. OPD managers and the Strategic Planning Committee considered creating a separate program for our civil cases. A substantial portion of our civil work is devoted to representing parents, putative parent and children in DN cases. Typically, a staff attorney will represent a biological parent, and the conflict coordinator will assign counsel to all other parties who are entitled by law to representation. Our consideration of this objective led to the conclusion that it was not feasible to create a separate, agency-wide program for all civil cases. However, with the Commission's approval, we have created a separate and independent Program 3 for the Conflict Coordinator. This Program oversees the bulk of our DN work, so while we have not created an independent program for all civil cases, we have done so for the largest and most costly aspect of our civil practice.

STAKEHOLDER ACTIVITY

The role of the chief public defender includes working with stakeholders to develop policy initiatives and to generate support for agency goals and projects. I am a member of the Montana Board of Crime Control. I serve on a committee that administers the John R. Justice Grant Program. This program provides loan repayment assistance for public defenders and prosecutors. I recently was asked to chair the Technology and Crime Reporting Committee.

I also serve on the Commission on Courts of Limited Jurisdiction. The Commission has been working on revisions to the judges' bench book and forms used by the judges.

I am also a member of the Forensic Sciences Laboratory Advisory Board.

In April, I attended a conference co-sponsored by the Casey Family Program on "Critical Legal and Clinical Indian Child Welfare Issues" in Missoula.

In May, Chairman Gillespie, Wade Zolynski, Kristina Neal and I attended a meeting with the State Bar Board of Trustees to discuss issues relating to public defense in Montana.

penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation.